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IN THE

Supreme Court of the United States

October Term, 1963

No. 432

MILTON ARONSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner Milton Aronson respectfully prays for a Writ of Certiorari to the United States Court of Appeals, for the Second Circuit, in order to review the order of said court affirming the judgment of conviction in the United States District Court for the Southern District of New York entered October 22, 1962 on a jury verdict of guilty of the offense of unlawfully, wilfully and knowingly using the mails in a scheme to defraud in the offer and sales of securities (Title 15, Section 77Q(a) and Section 77X; Title 18, Section 2 U. S. Code) and conspiracy so to do (Title 18, Section 371 U. S. Code). Petitioner was sentenced to three years on each of 3 counts (concurrent).

Opinions.

The opinion of the Circuit Court affirming the judgment of conviction is reported at ..... F. 2d ..... (June 6, 1963) and may be found in the appendices to this petition marked "Appendix A".

Jurisdiction.

The judgment of the Court of Appeals was entered on June 6, 1963. Petition for Rehearing was timely filed in the Court of Appeals and was denied on July 3, 1963. On July 25, 1963 an order issued from this court extending time to file this petition for writ of certiorari to and including August 17, 1963. Thereafter, on August 12, 1963, a subsequent order of this court extended the time for filing this petition to and including August 31, 1963.

The jurisdiction of the United States Court of Appeals was invoked under 28 U. S. C. Sections 1291 and 1294.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

I.

Is Rule 21(b) of the Federal Rules of Procedure Regarding Change of Venue in a Criminal Case Mandatory Upon Proper Motion in the Light of the Venue Provisions of United States Constitution Article III, Section 2, Clause 3 and Amendment VI as Construed With Amendment V (Fair Trial Due Process of Law) of Said Constitution?

A. In all cases.

B. Only in the absence of Congressional Acts fixing the place of trial.

C. In the instant case involving the offenses of conspiracy and Corporate Securities Act is venue "jurisdictional", *i.e.*, where the prosecution is initiated in New York against California residents and venue is equally

proper in California, is it a prejudicial abuse of discretion to deny the California residents' motion for change of venue:

1. Initially where the majority of the co-conspirators reside in New York; or

2. Subsequently when only the California residents are on trial and the Government's case rests primarily on evidence obtained from witnesses residing in California (or Nevada) or business records of California (or Nevada) residents.

II.

Does the Illegal Use of the Grand Jury Subpoena Process by the Executive Branch of the Government to Obtain Witnesses From Nevada and California Deny a Defendant a Fair Trial?

A. *Per se*; or

B. As tantamount to an unlawful suppression of material evidence where the prosecution has successfully resisted a motion by the defendant for a change of venue to a place where the subpoenaed witnesses (and records) are immediately accessible to both prosecution and the defendants; or

C. Where the trial court fails to hear evidence on alleged illegal process and or to strike the testimony of witnesses produced by such illegal process.

III.

Does the Deliberate Introduction in a Jury Trial of Prejudicial, Irrelevant and Inadmissible Evidence by the Prosecution Deny a Defendant a Fair Trial?

(Can an indicted co-conspirator who has pleaded guilty and been produced as a government witness be asked on direct examination if he has pleaded guilty to the offenses charged against him and the defendants on trial).

Constitutional Provisions Involved.

U. S. Constitution Article III, Section 2 Cl. 3:

"The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

U. S. Constitution Amendment V:

"No person shall . . . be deprived of life, liberty or property without due process of law . . .".

U. S. Constitution Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .".

Statutory Provisions.

Title 18 of the Federal Rules of Criminal Procedure states as follows:

> "Rule 17: (a) For attendance of witnesses; form; issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding . . .".

RULE 21: TRANSFER FROM THE DISTRICT OR DIVISION FOR TRIAL.

(b) Offense committed in two or more districts or divisions. The court, upon motion of the defendant, shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and the court is satisfied that in the interests of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

15 U. S. C. A. §77c. PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(a) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U. S. C. A. §77Q. FRAUDULENT INTERSTATE TRANSACTIONS.

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U. S. C. §77X. PENALTIES.

Any person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this subchapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon convic-

tion be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. A. §2. PRINCIPALS.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U. S. C. A. §371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C. A. §3237(a).

"Except as otherwise expressly provided by an Act of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is

a continuing offense and, except as otherwise expressly provided by an act of Congress, may be required of and prosecuted in any district from, through, or into, which such commerce or mail matter moves."

Statement of the Case.

(For clarity and convenience references to the appendix will be to the appellant's printed appendix of the record submitted to the court of appeals and certified to this court; references to the appendix to this petition will refer to the "opinion" of the court of appeals. Any other page references will refer to the certified record.)

1. Generally.

On December 7, 1959 petitioner Milton Aronson, along with his brother Sylvan B. Aronson, and eighteen other defendants were charged by indictment in thirty counts with violations of Title 15, Section 77Q(a), 77E(a)(1) and 77X; Title 18, Sections 2 and 371, United States Code in the offer and sale of securities, and unlawfully, using the mails and telephonic communications in interstate commerce in a scheme and artifice to defraud and conspiracy so to do (App. 1).

2. Statement with respect to the venue question.

On February 2, 1960, one month after the defendants Milton and Sylvan Aronson had been arraigned and entered pleas of not guilty, they jointly moved for a transfer of their prosecution to the Southern District of California, where they both resided (App. 2a, Docket Entry, February 2, 1960). This motion was opposed by the government (App. 4, Docket Entry, March 16, 1960). At the same time the Aronsons moved for a

bill of particulars (App. 3a, Docket Entry, February 2, 1960), which motion was withdrawn at argument of the venue motion, "in the light of the government's concession that the acts of these defendants were performed in southern California and Nevada" (App. 3a, Docket Entry February 29, 1960). In a memorandum of opinion filed March 10, 1960 (App. 145a *et seq.*), Judge Kaufmann denied the motion for transfer (App. 3a). The official report of said opinion is reported at 25 F. R. D. 172, *sub nom, United States v. Kimball Securities, Inc.* Two and one-half years later on September 7, 1962 when trial of all defendants was set for October 1, 1962 the government moved for severance of the Aronsons (App. 163a) on the grounds that the case was divided in two parts, chronologically and factually, the Aronsons being involved only in the first phase in late 1957 during which time they were involved in the sale of stock of Great Western Enterprises, Inc. and the rest of the defendants having participated in the later phase involving the "boiler room" sales of the stock of the successor corporation, Mark, Inc. and Perry (see Mr. Morrison's remarks to the court on September 10, 1962 App. 160a-166 8a).

In view of the drastic change of circumstances, the Aronsons quickly renewed their transfers motion which again met with Government opposition (App. 8a, 9a, Docket Entry September 14 and September 17, 1962; App. 164 A. 149a-160a, motion with affidavits).

In their motions defendants (and petitioner, in particular) urged transfer because of the government's request for severance, the inconvenience of defending themselves so far from home, the difficulty of obtaining witnesses to acts and transactions which largely oc-

curred in California and Nevada and also upon the grounds of the physical hardship of standing trial in New York due to petitioner's severe diabetic condition (App. 149a-160a).

By the order of Judge Dawson, who was to become the trial judge, entered on September 14, 1962, the Aronsons were severed and their trial was set for October 1, 1962 and the trial of the other defendants was continued until approximately one week after the conclusion of the Aronson trial (App. 8a, Docket Entry September 14, 1962). At the same time Judge Dawson denied the transfer motion, stating in part:

> ". . . The fact that the defendants may not have been in New York and do not reside in New York is no indication that the interests of justice would not be served by trying the case where the fraudulent sales of securities were brought about. There is undoubtedly inconvenience to the defendants coming from California to New York for trial but every criminal case gives rise to inconvenience to the indicted defendants . . ."

The trial began on October 1, 1962 and at the conclusion of the government's case the change of venue motion was again made and denied (App. 90a).

The earlier opinion of Judge Kaufman in denying the original transfer motion (App. 145a) admits that venue would be proper in the Southern District of California at least as to the conspiracy charge (App. 146a) but predicates the denial basically upon the fact that he felt the granting of the motion was discretionary with the court and that in considering the interests of

the Aronsons they should be subservient to the interests of the other defendants thus:

(App. 147a). "... I am of the opinion that the trial of all counts of all defendants in this district will lead to the fairest and most equitable handling of the entire case and that a transfer is not necessitated by the 'interests of justice.'

"Defendants allege nothing more than expense and inconvenience as a grounds for this transfer. While these grounds may be sufficient under certain circumstances, see *United States v. National City Van Lines*, 7 F. R. D. 393-397-398 (Southern District of S.D. Cal. 1948), and this may be so even though the transfer would necessitate a severance and separate trials, see United States v. Erie Basis Metal Products Co., 79 Fed Supp 880, 855-886 (District of Md. 1948), the decision is still discretionary. In the instant case all factors militate in favor of holding the trial in the Southern District of New York ...".

3. Statement of the case with respect to the improper examination by the government.

Joseph C. Kimball, an indicted co-conspirator on all counts (App. 1) was called as a witness for the government. The following excerpt from the record (App. 65a, *et seq.*) occurred upon the very first question asked by the prosecution, Mr. Morrison of the witness:

"Q. Mr. Kimball, have you ever been convicted of a crime? A. Yes. I have pleaded guilty to several charges.

Mr. Herwitz: Now wait. I object.

Mr. Steinberg: If your Honor please, I ask for a mistrial, mistrial on the question that prior consistent statements are hearsay, ask for a mistrial and discharge of the jury.

Mr. Herwitz: I join in that motion.

The Court: Motion is denied; your exception is noted."

Joseph C. Kimball—for Government—Direct

"Q. Please answer the question. A. I pleaded guilty to several charges in this case.

Mr. Herwitz: If your Honor please, the question was, was he ever convicted of a crime and it calls for a yes or no answer.

The Court: No, he says he has pleaded guilty, which is a submission that he was convicted of a crime. All right, go ahead.

Mr. Steinberg: Now incidentally conviction is defined by the law as a sentence.

The Court: You can bring that out. You can bring that out.

Mr. Steinberg: I think it is prejudicial to bring it out and I am not going to place myself in the position of bringing anything out that is prejudicial.

The Court: The witness says that he has pleaded guilty to the commission of a crime. All right, go ahead. Go ahead, Mr. Morrison, next question.

Q. Have you any other convictions, sir? A. Yes, one.

Q. What year was that? A. 1936.

Q. What was the charge? A. Taking a football bet.

Q. Do you know the defendant Milton Aronson? A. Yes.

Q. Do you see him here in the courtroom? A. Yes.

The Court: Mr. Morrison, he said he has pleaded guilty, but I don't know what he pleaded guilty to. You better bring that out.

Mr. Steinberg: I object to that, if your Honor please. I object to any further discussion about that and take exception to your Honor's question.

The Court: I say that he asked him if he was convicted of a crime, and I want to know what kind of crime it was.

Mr. Steinberg: I object again to your Honor's remark.

The Court: I want to know whether you do or not.

Mr. Steinberg: I object to that.

The Court: Your objection is noted. Mr. Steinberg, sit down.

Mr. Steinberg: I want to state the grounds of my objection.

The Court: State them.

Mr. Steinberg: I object to your Honor's remark whether I want to know it or not. I think that is an improper remark and take exception to it.

Q. Mr. Kimball, will you answer the question.

The Court: What crime did you plead guilty to?

The Witness: I pleaded guilty to selling securities.

The Court: Selling securities how?

The Witness: Telephone, mail.

The Court: Through the mails?

The Witness: Yes."

The lengthy testimony of this witness which followed is admissions on his plea of guilty to the instant charges was the Keystone of the government's proof against petitioner (see Record pages 698 to 1120-a for complete testimony of the witness). He testified about conversations and transactions with petitioner that went to the very heart of the fraudulent scheme of the conspiracy the government was seeking to prove. Proof of petitioner's intent and of certain substantive and overt acts basic to the fraudulent scheme in the substantive counts and to the agreement in the conspiracy count depended largely upon the credibility of Joseph Kimball. Appellant's mistrial motion was renewed at the close of the government's case and again denied (App. 91a-94a).

At the very close of the case in the instructions of the court (App. 100a-101a) the court stated to the jury as follows:

"I will now go into the different counts of the indictment and the relationship of the defendants on trial to those counts. There were originally, 20 defendants indicted by the grand jury. As you have heard on the cross-examination of Joseph C. Kimball, who was called as a witness in this case, he was one of the defendants in the case. He pleaded guilty, as did his son, Frank Kimball, and also Kimball Securities Incorporated, which was their corporation. So they are out of the case.

"In order that this case might not run an undue length of time, and in order to clarify the issues, the court severed the trial of the two defendants now on trial, MILTON R. ARONSON and SYL-

VAN B. ARONSON, from the trial of the other defendants. The trial of the other defendants will be had after this case is concluded before a different jury. You are concerned solely with the guilt or innocence of MILTON R. ARONSON and SYLVAN B. ARONSON.

"Let me point out the fact that the Kimballs pleaded guilty is no proof whatsoever of the guilt of the two defendants who are on trial and that must be put out of your mind in determining the guilt or innocence of these two defendants, the Aronsons."

4. Statement of the case with respect to the unlawful use of the grand jury subpoenas by the government.

Cross-examination of government witness Frank Casone of Las Vegas, Nevada developed that he was brought to New York for questioning by the United States Attorney's office under a grand jury subpoena in September, 1962 shortly before the trial (App. 53a-54a, 50a). It was the first time the witness had given a statement to the government (App. 56a). Mr. Morrison, the assistant United States Attorney acknowledged that Casone had been subpoenaed at that time and that he gave a statement to Morrison but was not taken before the grand jury (App. 57a-59a). The same process of the grand jury was used to bring government witness Thomas A. Craig from California to New York in September, 1962 for examination by government counsel (App. 61a). Craig, like Casone, did not appear before any grand jury (App. 63a) although he was kept in New York for one whole week at the disposal of the United States Attorney's office (App. 65a). Like Casone, the subpoena was Craig's first notice that he

was to be used as a government witness (App. 63a-64a). The government also admitted that other witnesses were brought to their offices under grand jury subpoenas and interrogated there (App. 60a). No grand jury proceeding in this case was underway at the time these witnesses were hauled across the continent and commanded to appear before a grand jury (App. 86a-88a); indeed the indictment in this case had been returned more than two and one-half years previously (App. 2a, Docket Entry, December 7, 1959). The only appearance made by them was in the office of the United States Attorney for questioning by his assistants preparing for trial. Petitioner and his then co-defendants, Sylvan Aronson moved the court to hold a hearing to inquire into the proper use of grand jury process by the government and to strike evidence and testimony thus obtained; the motion was denied (App. 59a-61a, 86a-89a). (See the Record pages 2720-2720 for written motion of Sylvan Aronson and Judge Dawson's memorandum endorsement.) This motion was joined in by petitioner (App. 87a). The motion was renewed at the close of the government's case and again denied (App. 90a-91a).

Although it appears by the record that the Defense motions were made October 23, 1962 (App. 10a) to have subpoenas issued by the court for witnesses and for the order excluding testimony of witnesses obtained through the illegal grand jury process, it is apparent that this is a clerical error and that the motions were actually made sometime during the course of the trial. In any event, the trial court refused to subpoena witnesses on behalf of the defendants under Rule 17b of the Federal Rules of Criminal Procedure from the State

of California and transported to the New York Court at government expense. It seems quite obvious that the motion was denied (although the reason does not appear on the record), because the defendants could not show that they were "indigent".

REASONS FOR GRANTING THIS WRIT.

I.

With Respect to the Question of Venue.

A. Important questions of law need to be settled by this court regarding the constitutional right of a criminal defendant to have a trial in his own state where the crime is committed there.

B. The Court of Appeals has rendered a decision in conflict with the decisions of other courts of appeal and in conflict with the applicable decisions of this court.

C. The Court of Appeals has sanctioned departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Three different reasons were given by the courts below for the denial of the motions for a change of venue, each of the three reasons being peculiarly unsatisfactory and directly contrary to the propositions set down by this court with respect to venue.

In the first instance, District Court Judge Irving R. Kaufman held (App. 145a) that although the venue would be proper in California and that the trial in New York would be inconvenient to the defendants Aronson,

the inconvenience of the Aronsons should be balanced against the inconvenience of the government and the co-defendants and the District of New York was thus the most logical and convenient place in which to hold the trial.

After the government announced that it was moving to sever the defendants Aronson and to proceed on five to six counts of the indictment (eventually they were only tried on three counts) and after the government had admitted that the charges in the indictment to be tried were with respect to acts performed in Nevada

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". . . Thus, conducting the trial in this district will be more convenient not only for the government, but for most of the defendants . . . " (App. 1458).

This rationalization of the District Court Judge is rather surprising in light of the pronouncements of this court such as in *Johnston v. United States, infra*, 351 U. S. 220, 222:

". . . This requirement of venue states the public policy that fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused. . . . a variation from that rule for convenience of the prosecution or the accused is not justified. . . ."

See also, *United States v. Johnson, infra*, 323 U. S. 277, 279 (Opinion by Justice Frankfurter):

". . . The large policy back of the constitutional safeguards counsels against the unrestricted construction for which the Government contends when Congress has not commanded it; and no considerations of expediency require it. Prosecutions of Federal crimes are under the general supervision of the Attorney General of the United States; United States Attorneys do not exercise autonomous authority. The vindication of the Federal Venture Act therefore does not depend upon the willingness of some local United States Attorney to prosecute on behalf of a local victim. While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the crime the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise . . . of marshalling his witnesses), as well as the temptation to abuses already referred to, in the administration of criminal justice. . . ."

and California, the trial court ruled, conceding the above, that the mere fact there was inconvenience to the defendants could not stand as a proper ground for change of venue for the trial since all criminal defendants are "inconvenienced" (App. 101a-102a).

The Circuit Court of Appeals neatly sidestepped any consideration of the problem by relating the question as to whether or not the denial of the change of venue was a denial of a fair trial under the rules of appellate review, deciding of course that there was no denial of a fair trial and therefore no "abuse of discretion". The questions is not whether, after the fact, a fair trial has been denied because of the failure to grant a change of venue, but rather whether or not the failure to grant a change of venue results in the denial of a fair trial.

This court, in a series of four decisions (all of them being either 6-3 or 5-4) has set down some basic propositions with respect to the question of venue in criminal cases:

1. Under the Constitution determination of proper venue in a criminal case requires determination of where the crime was committed.

2. Questions of venue raise deep issues of public policy in the light of which legislation must be construed.

3. The provisions of Rule 18 of the Federal Rules of Criminal Procedure regarding trial in the vicinity of the crime, is a safeguard against the unfairnes sand hardship involved when an accused is prosecuted in a remote place.

4. To the extent that the language of the Federal Criminal Statute permits, it will be given a construction

which will respect the consideration that an accused is subject to unfairness and hardship when he is prosecuted in a place remote from the vicinity of the crime.

United States v. Johnson (1944), 323 U. S. 275, 89 L. ed. 236;

Johnston v. United States (1956), 351 U. S. 215, 100 L. ed. 1097;

United States v. Cores (1958), 356 U. S. 405, 2 L. ed. 2d 873;

Travis v. United States (1961), 364 U. S. 631, 5 L. ed. 2d 340.

Although this court has referred to the provisions for trial in the vicinity of the crime as being a safeguard against "unfairness" involved when an accused is prosecuted in a remote place (*United States v. Cores, supra*) and of "fairest trial" (dissent of Justice Douglas, *Johnston v. United States, supra*) it has not seen fit to equate this with "due process of law" as it has in other cases. Assuming, *arguendo*, that Congress has the power to fix the place of venue of a criminal offense, in the absence of so fixing that venue specifically do not the provisions of Article III Section 2 Cl. 3 and the Sixth Amendment completely override any "discretionary" power the court might have to fix venue and in fact make venue at the home of the defendants the only proper venue?

Section 103 of Title 28 United States Code (1940 edition) the predecessor of 18 U. S. C. Sections 32, 37 was originally a part of the conspiracy statute, and thus was regarded as particularly applicable to the crime of conspiracy. *Reass v. United States* (4th Cir.), 99 F. 2d 752. Since conspiracy is a continuing crime the

present statute, 18 U. S. C. 32, 37, has been applied in determining the venue of conspiracy prosecutions:

Krogmann v. United States, (6th Cir.), 225 F. 2d 220;

United States v. Patrisso (2nd Cir.), 262 F. 2d 194;

United States v. Seagraves (3rd Cir.), 265 F. 2d 876.

A conspiracy prosecution is triable in any district in which an overt act was committed in furtherance of the conspiracy *United States v. Socony-Vacuum Oil Co.* (1940), 310 U. S. 150, 84 L. ed. 1129.

In *United States v. Cashin* (2nd Cir.), 281 F. 2d 669, it was held that by virtue of 18 U. S. C. Section 3237(a) a prosecution for a violation of 15 U. S. C. Section 77q was triable in the district where the scheme was formed and in a large measure executed, even though the mailings were made and the deliveries were received elsewhere.

In light of the fact that in the instant case the defendant was severed from all other defendants who were engaged in the New York operations of the alleged conspiracy and that the evidence of the overt act performed was that of overt acts in California (and Nevada), it is quite clear not only was venue proper in California, but probably essential. In any case it is quite clear that the considerations of the District Court and Circuit Court of Appeals in denying the motions for venue were not based upon any proper considerations or guide lines set down by this Court and were thus a complete abuse of discretion.

II.

With Respect to the Question of the Illegal Use of the Grand Jury Subpoena Process by the Executive Branch of the Government.

A. Important questions of law must be settled by this Court with respect to the extent that this abuse of process can be sanctioned by the courts; or whether this type of extra legal proceedings can be justified under any circumstances.

B. The Court of Appeals sanctioned such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

In passing upon the question of the illegal use of grand jury subpoenas to bring witnesses to New York for questioning by the prosecution, the Court of Appeals (Opinion pp. 8-9) admitted that the improper use of grand jury subpoenas cannot be condoned, but ruled that the test must depend upon the good faith of the prosecution in obtaining the subpoenas and that the trial court is in the best position to satisfy itself as to any such impropriety.

In the instant case not only did the trial court refuse to entertain a motion to have witnesses sworn concerning the propriety or impropriety of the use of the grand jury subpoenas but seemed to rely entirely upon its memory and the statement of the prosecution attorney that there were always grand juries in attendance in New York and summarily denied the motions to strike the testimony of the witnesses so obtained. As shown in the record (App. 60a) the U. S. Attorney, Mr. Morrison, admitted that there were other witnesses besides Craig and Casone who had been brought across coun-

try for interrogation on grand jury process but could not recall the exact number. Of course it should be noted that these witnesses were brought to New York by grand jury process some two and one-half years after the original indictment had been issued (App. 2a, Docket Entry December 7, 1959). When the defendants could not show that they were "indigent" the court presumably had every right under the Rules of Criminal Procedure, Rule 17b, to refuse to bring the defendants' witnesses across country at government expense. The result of the use of this economic coercion was to effectively deny the defendants the right to have compulsory process for obtaining witnesses in their favor (U. S. Constitution Amendment VI).[2]

Although the subject matter is noteworthy for its dearth of cases in the area, it is respectfully submitted that the Court of Appeals cannot abdicate its responsibility to review the record and approve the actions of the trial court by the use of the rubric that the trial court was in the best position to review the matter when the trial court did not initiate any type of review.

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[2]The magnitude of the abuse of the administration of criminal justice in the instant case is reflected by the record that of the 38 witnesses presented by the Government, 27 were from California and Nevada. Of the remaining 11, approximately 8 were from New York, the remaining 3 from Eastern states.

The prosecution brought in as part of their case two witnesses from California (a printer and his wife), to show that upon the formation of the corporation the defendant Sylvan Aronson, a California attorney, had ordered stock certificates printed and had subsequently re-ordered new certificates. Where records of Nevada or California corporations were required the prosecution used the simple expedient of having New York witnesses, members of parent or associated corporations, identify the books and records or copies thereof of the subsidiary corporations in California or Nevada.

In contradistinction the defendants were able, at their own expense, to secure only three witnesses.

The United States attorney cannot use a grand jury subpoena to examine a witness in his office. *Cf., Durbin v. United States* (D. C. Cir.), 221 F. 2d at 520. Subpoena process belongs to the court, not to the executive branch of the government. *In re National Window Glass Workers* (N. D. Ohio), 287 Fed. 219, 225; *cf., United States v. O'Connor* (D. Mass.), 118 F. Supp. 248.

The government in this case usurped the grand jury's authority and made pre-trial discovery to which it not entitled under the federal rules. No unlimited pre-trial discovery such as exercised here by the United States attorney's office is given to the government by the rules. The summoning of witnesses Casone and Craig and others not specifically mentioned and their interrogation as potential witnesses was a circumvention of the limitations of the Federal Rules upon pre-trial examination of witnesses. Prejudice to petitioner becomes apparent when one considers that the government as represented by the United States attorney's office was "speaking out of both sides of its mouth". In one instance it was opposing a change of venue to the very place from whence the witnesses were summoned and at the same time using Government funds to have witnesses from that jurisdiction "hauled across the continent" (*United States v. Johnson, supra*, 323 U. S. 279, 281) to be interrogated as possible witnesses for the trial. It is obvious that the United States attorney's office could not have used the procedures outlined under Rule 17 of the Federal Rules of Criminal Procedure for if they had done so the fact would have become an open and notorious one and

would probably have been good cause for the court to grant the motion for the change of venue.

By the invidious use of secret grand jury process the United States attorney was able to circumvent court scrutiny and would never have had to account for his actions were it not for alert defense counsel bringing the matter to light.

Securing evidence by such flagrant abuse of the court's process and arrogant disregard of the established procedures in criminal prosecutions is a serious violation of the standard of decency and fairness essential to criminal trials in federal courts. Observance of the untainted administration of justice is "one of the most cherished aspects of our institutions".

> *Communist Party v. Subversive Activities Control Board* (1955), 351 U. S. 115, 124, 100 L. Ed. 762.

The evidence adduced in this case through witnesses Casone and Craig was tainted by the manner in which it was obtained. While it may not have been secured in violation of any specific statute nor expressly prohibited by any rule of law, neither was the method used in adherence to any duly conferred authority. This court should exercise its supervisory powers over the administration of justice in the Federal courts to rule such evidence inadmissible and reverse the appellant's conviction based on such evidence. Consideration of the dangers and abuses inherent in the usurpation of the grand jury processes by government's attorneys compels the conclusion that the integrity of the Federal Court should not be subordinated or sacrificed to law enforcement methods so plainly improper and lacking in au-

thority. "And the dignity of the United States Government will not permit the conviction of any person on tainted evidence."

Mesarosh v. United States (1956), 352 U. S. 1, 9 L. Ed. 2d 1.

The activities of the prosecution in this case bear strong resemblance to the question raised as to whether the defendant will be allowed advance disclosure of evidence upon which the prosecution plans to base its case, or whether he will be allowed any disclosure of evidence that the prosecution does not intend to produce in court at all. See *United States v. Krulewitch* (2nd Cir.) 145 F. 2d 76, 78, 156 A. L. R. 337.

It is tantamount to a suppression of evidence which this court has never permitted on the grounds that to allow such an imbalance between the advantages of the prosecution and the defense would be to lose sight of the true purpose of a criminal trial, the ascertainment of the facts. See *Gordon v. United States* (1953), 344 U. S. 414, 97 L. Ed. 447; *Asgill v. United States* (4th Cir.), 60 F. 2d 776, 778-779.

The activities of the prosecution as outlined herein and in the subsequent section do not seem to be consonant with the role outlined for him in *Berger v. United States*, 295 U. S. 78, 88, 79 L. Ed. 13, 14, 1321.[3]

[3] "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall be able to win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape nor innocence suffer. He

III.

With Respect to the Improper Examination of a Co-Conspirator Government Witness as to His Plea of Guilty.

A. Questions of law needs to be settled by this court regarding the extent to which a prosecutor can wilfully and knowingly commit prejudicial error hoping that this error can be "cured" either by subsequent instruction or sanctioned by the indulgent eye of the Court of Appeals.

B. The Court of Appeals has rendered a decision in conflict with the decision of other courts of appeal.

C. The Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

In the instant case the court of appeals approved of the tactics of the prosecution in calling a government witness (an indicted co-conspirator who had pleaded guilty), and on the first question inquiring as to his plea of guilty, as a "time honored and approved practice" citing the case of *United States v. Freeman* (2d Cir.) 302 F. 2d 347, 350, as indicating that "'not to have

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may prosecute with earnestness, and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce the wrongful conviction as it is to use every legitimate means to bring about a just one."

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

done so would surely have subjected the prosecution to criticism".

Of course the Court of Appeals conveniently ignored the fact that in the same case it was stated:

> "there may be circumstances where, on proper request of the defense, a trial judge should limit or even bar such testimony, or allow it only under cautionary instructions because the prejudice to the defendant of the witness's admission of crime implicating the defendant would outweigh the advantages of the full disclosure of the witness's criminal background".

It is obvious that the rule of law enunciated by the court of appeals in the instant case is contrary to the majority of the recent decisions of other courts and to the concept of giving a criminal defendant a fair trial based upon the evidence against him and not of the guilt or complicity of others. If it can be agreed that the evidence of a co-conspirator pleading guilty is completely irrelevant and immaterial (as expressed by the court in the charge to the jury) then the only purpose for which such a question could be asked on a direct examination would be to prejudice the jury and imply that the charges were true because a co-conspirator was testifying who had pleaded guilty to the same offenses.

In the case of *Carter v. United States* (D. C. Cir.) 281 F. 2d 640, where a police officer witness was asked for the admissions of the defendant and volunteered the information that the admissions were made after one of the other defendants had pleaded guilty, the court castigated the police officer's actions as "inexcusable" and

would only give him the benefit of the doubt that he was not experienced as a witness although this was highly improbable due to his length of service on the police force.

Again in *Minker v. United States*, 3rd Cir., 85 F. 2d 425, where fifty-four defendants were allowed to plead guilty in front of the jury it was held to be prejudicial to the remaining defendant and see also *Payton v. United States*, D. C. Cir., 222 F. 2d 794, where a co-defendant's plea was taken in front of a jury it was held that the effect of impressing the jury so forcibly with the plea of guilty prejudiced the appelkant's rights to be tried solely on the evidence against him rather than on the admission of another's guilt citing the cases of *United States v. Toner* (3rd Cir.), 173 F. 2d 140; *United States v. Hall* (2d Cir.), 178 F. 2d 853; and *Nigro v. United States* (8th Cir.), 117 F. 2d 624, 632 (133 A. L. R. 1128).

For other cases contrary to the Court of Appeal's position in this case see *United States v. Hall* (2d Cir.), 178 F. 2d 853; *Babb v. United States* (5th Cir.), 218 F. 2d 538; *Leroy v. Government of Canal Zone* (5th Cir.), 281 F. 2d 914; *Cf., United States v. Crosby* (2d Cir.), 294 F. 2d 928, 948.

Therefore, it is respectfully submitted to this court that not only was the permitting of the government to ask their own witness on the first question as to whether or not he had pleaded guilty to the charge on which the defendants were being tried extemely prejudicial which could not be cured by any instruction of the judge either immediately or at the end of the case, but that to say the least there is a conflict of decisions among the

various circuits as to whether or not this type of prejudice can be "cured or whether or not it is *ipso facto* prejudicial. This court should exercise its general powers of jurisdiction to resolve these conflicts for the benefit of all persons concerned.

Conclusion.

For the reasons herein stated, petitioner respectfully urges that his petition for writ of certiorari be granted.

Dated: August 19, 1963.

BURTON MARKS,
Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals.

United States Court of Appeals, for the Second Circuit.

No. 276, October Term, 1962

(Argued March 14, 1963. Decided June 6, 1963).

United States of America, Appellee, against Milton R. Aronson, Appellant. Docket No. 27942.

Before: Moore, Friendly and Smith, *C. JJ.*

Appeal from conviction in the United States District Court for the Southern District of New York, Archie O. Dawson, Judge, before a jury; of violations of 15 U. S. C. §§77q(a) and x and 18 U. S. C. §§2 and 371.

Affirmed.

C. William Tayler, Washington, D. C. (Thomas A. Wadden, Jr., Washington, D. C., of counsel), for the appellant.

Peter H. Morrison, Assistant United States Attorney, New York, N.Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Thomas J. Cahill, Arthur I. Rosett, Assistant United States Attorneys, New York, N. Y., of counsel), for appellee.

Moore, Circuit Judge:

The defendant (appellant), Milton R. Aronson, appeals from a judgment of conviction of the offense of unlawful, wilful and knowing use of the mails in a scheme to defraud (15 U. S. C. A. secs 77q(a) and 77(x), 18 U. S. C. A. (2)) and of conspiracy to do so (18 U. S. C. A. 371).

The Indictment:

The indictment contained 30 counts and named 2 corporations, Kimball Securities, Inc., and 19 individuals. Counts One and Two charged unlawful use of the mails in connection with the purchase of stock of Great Western Enterprises, Inc., by two persons, resident respectively in Massachusetts and Maryland. Counts Three through Eleven related to stock of Mark, Inc. and Counts Twelve through Fourteen to Stock of Perry Oil Company, the same statutory violation being charged. Counts Fifteen through Twenty-Four were based upon the transmission of wires and telephone communications to various persons as part of a scheme to defraud (15 U. S. C. A. secs. 77q(a) and (x); 18 U. S. C. A. (2)). Counts Twenty-Five through Twenty-Nine dealt with unlawful use of the mails to sell unregistered securities of Mark, Inc. and Perry Oil Company (15 U. S. C. A. secs. 77e(a)(1) and (x) and Count Thirty was a conspiracy count which included all three stocks Great Western, Mark and Perry Oil Company (18 U. S. C. A. 371).

Pre-Trial Motions

Prior to the trial, the defendants Sylvan B. Aronson and Milton R. Aronson sought by motion to transfer their prosecution to the Southern District of California, the area of their residence. The motion was denied on March 10, 1960. At a pre-trial conference on September 7, 1962, the government requested that the Aronsons be severed from the other defendants, that the trial proceed against them and that the trial against the remaining defendants be set for one week after the conclusion of the Aronsons' trial. On September 10,

1962, the prosecution announced that it would proceed against the Aronsons on Counts One, Two and Thirty and possibly three more. On September 14, 1962, these defendants again moved for a change of venue which was denied.

The Trial

The trial commenced on October 1, 1962 against the two Aronsons on Counts One, Two and Thirty. Sylvan was acquitted; Milton was convicted on all three counts.

The Errors Asserted

No errors relating to the sufficiency of the evidence or to the court's charge as to the essential elements of the crimes alleged in the indictment are asserted. A review of the facts constituting the scheme to defraud is, therefore, unnecessary.

1. The first error claimed to be prejudicial is the court's comment in its charge that "In order to keep this case within reasonable bounds, the Government has elected to present proof on only three of the counts, the first, the second, and the 30th counts." The court then advised the jury that "We are, therefore, in this trial, concerned solely with the guilt or innocence of the defendants Milton Aronson and Sylvan Aronson on counts 1, 2 and 30 of the indictment."

These statements in the charge had been preceded by substantial colloquy between court and counsel as to the method of handling the situation created by the prosecution's restricting its proof to the Great Western stock promotion (counts 1, 2 and 30). Sylvan Aronson's counsel (Milton's counsel joining therein) moved to dismiss counts 3 through 29 and sought a judgment

of acquittal as to them on the ground that the government had offered no proof therein. The court granted the motion.

When the question of how the jury should be advised of the action taken arose, counsel for Sylvan stated that if the court told the jury that "some were dismissed, they [the jury] could make out an inference that the others were sufficient." On appeal, counsel for Milton argues conversely that the court's reference to the limitation of the trial to the three counts "to keep this case within reasonable bounds" called for the inescapable inference in the minds of the jury that the government had an abundance of evidence as to the other twenty-seven counts which it withheld merely to shorten the trial. He contends that the court should have advised the jury that his client had been acquitted on counts 3 through 29. Whether such information would have pointed up possible guilt as to the remaining counts, as Sylvan's counsel feared in his argument concerning possible jury inferences, would be mere appellate speculation.

The court meticulously informed the jury of the issues to be determined by them and of the restriction to transactions in Great Western stock. No issues as to Mark, Inc. or Perry Oil stock were presented to the jury for decision. From the indictment itself, it must have been clear to the jury that the other counts related not to Great Western but to Mark, Inc. and Perry Oil, as to which no proof had been offered. The issues to be resolved were kept in clear focus by the court at all times. The fears now expressed of improper inferences by the jury as a result of the court's comments are unwarranted.

II. In practically every criminal prosecution, the government's principal witness or witnesses are drawn from the ranks of co-defendants, co-conspirators or participants in the allegedly unlawful enterprise. Often they have pleaded guilty before trial. And so here. Joseph C. Kimball, a defendant who operated Kimball Securities, Inc., was an important witness. He had had direct dealings with Milton Aronson for the sale of Great Western stock. Therefore, if he pleaded guilty the jury might infer that Milton was also guilty. The prosecution called Kimball and, adhering to time-honored and approved practice, asked him he had ever been convicted of a crime.[1] "Not to have done so would surely have subjected the prosecution to criticism."[2] Counsel on direct examination usually adopt the policy of bringing out such adverse facts as they know will be developed on cross-examination. Failure to disclose would then be characterized as an intent to conceal.

Needless to say, a subject so common to criminal trials has been passed upon by many appellate courts so that there is no longer any uncertainty as to the law.

In *Davenport v. United States*, 260 F. 2d 591 (9th Cir., 1958) (mail fraud), a co-defendant pleaded guilty on the third day of the trial. The court stated to the jury, "We are not going to try Mr. Errion [a defendant] here any longer. He has pleaded guilty. He is safely in jail. I think we have all we can do to try

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[1]"Q. Mr. Kimball, have you ever been convicted of a crime?
A. Yes, I have pleaded guilty to several charges.
* * *
The Court: What crime did you plead guilty to?
The Witness: I pleaded guilty to selling securities.
The Court: Selling securities how?
The Witness: Telephone, mail."

[2]*United States v. Freeman*, 302 F. 2d 347, 350, 2d Cir., 1962.

the other six defendants that are here without discussing Mr. Errion any further" (p. 595). Another defendant, Montgomery, also pleaded guilty. The court in its instructions said "the pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed" (p. 596). On appeal the court said, "We see no error in the court's informing the jury of the fact that these two persons had pleaded guilty." (p. 596). Thereafter, in *Wood v. United States*, 279 F. 2d 359 (8th Cir. 1960) (mail fraud), there were nine defendants. Before trial, two withdrew their not-guilty pleas and pleaded guilty. During the trial, three defendants withdrew their pleas of non-guilty and pleaded guilty. The trial court in advising the jury of this change of plea said in part:

> "I want to tell you again the fact that such pleas were entered does not mean that the remaining three defendants on trial * * * are guilty with them. The pleas are not evidence to the defendants remaining on trial that they are guilty, or the crime charged in the indictment was committed.
>
> "These pleas do not give rise to any inference as to the guilt of the remaining defendants here on trial. The guilt or innocence of the defendants still on trial must be determined solely by you, solely by the evidence introduced in the trial of this case." *Id.* at 362.

These instructions were approved on appeal as was the denial of the motion for a mistrial based upon the pleas of guilty and the trial court's reference thereto. See, also, *Richards v. United States*, 193 F. 2d 554 (10th

Cir., 1951), and *Nemec v. United States*, 178 F. 2d 656 (9th Cir., 1949).

In this circuit, somewhat similar situations have arisen, although counsel in the various cases have approached the problem somewhat differently. In *United States v. Grosby*, 294 F. 2d 928 (2d Cir., 1961), a defendant pleaded guilty at the end of the first week of trial. The plea was accepted out of the presence of the jury "because counsel for most of the defendants felt a cautionary instruction would only serve to call the jury's attention to—and emphasize—the guilty plea. The court did not inform the jury of the circumstances concerning McCarthy's subsequent absence from the case and the court room." *Id.* at 948. On appeal this court said, "But the federal courts have uniformly held it not error, if proper cautionary instructions are given, for the jury to be informed during trial that one or more defendants have pleaded guilty, or even for the jury to be present when the pleas are entered." *Ibid.* See also *United States v. Murray*, 297 F. 2d 812 (2d Cir. 1962); *United States v. Freeman*, 302 F. 2d 347 (2d Cir. 1962).

This being the law, no error can be attributed to the trial court's informing the jury of the guilty plea. Its instructions to the jury conformed both adequately and accurately with the instructions approved by appellate courts in similar situations. The trial court adhered to proper practice in cautioning the jury by saying, "Let me point out that the fact that the Kimballs pleaded guilty is no proof whatsoever of the guilt of the two defendants who are on trial and that must be put out of your mind in determining the guilt or innocence of these two defendants, the Aronsons."

III. Appellant contends that denial of his September 1962 motion for a change of venue was an abuse of discretion. Whether the government should have made its application to sever some time prior to the eve of the trial (September 7, 1962 application; October 1, 1962 date fixed for trial), whether the convenience of the two defendants would have been better served by a California venue or whether expense to these defendants would have been avoided thereby are questions which must now be answered in the light of the paramount appellate question: were these defendants deprived of a fair trial as a result of the denial? There were many compelling reasons for New York venue and many for California. The ultimate object of the scheme was to sell Great Western stock to the public. These defendants chose to accomplish this by utilizing a New York distributor. Having made this choice, they can scarcely complain of a New York venue. There was no abuse of discretion. Furthermore, an examination of the record discloses that no prejudice to these defendants resulted from a New York trial.

IV. Lastly, appellant complains of allegedly illegal use of grand jury subpoenas to bring witnesses to New York for questioning by the prosecution. There is no contention that the testimony given by the two witnesses so served was false or was obtained by threats or coercion. In final analysis the test must depend on the good faith of the prosecution in obtaining the subpoenas. Failure to put the witnesses subpoenaed before the grand jury is not *ipso facto* proof of bad faith. After a witness has given a statement which would not justify his appearance before a grand jury, it would be unfair to him to subject him to such an ordeal. Al-

though improper use of grand jury subpoenas cannot be condoned, the trial court is in the best position to satisfy itself as to any such impropriety. The witnesses here were subjected to full cross-examination as to the circumstances of their appearances and no proof was elicited of threats or false testimony.

Affirmed.